

# **EXHIBIT F**

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IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF DELAWARE

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F'REAL FOODS, LLC, ) Civil Action  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 HAMILTON BEACH BRANDS, INC., )  
 HERSHEY CREAMERY COMPANY and )  
 PAUL MILLS d/b/a MILLS )  
 BROTHERS MARKETS, )  
 )  
 Defendants. ) 14-1270 (GMS) (MPT)

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Wilmington, Delaware  
 Tuesday, December 29, 2015  
 10:00 a.m.  
 Telephone Conference

- - -

BEFORE: HONORABLE GREGORY M. SLEET, U.S.D.C.J.

APPEARANCES:

RODGER D. SMITH, II, ESQ., and  
 ETHAN H. TOWNSEND, ESQ.  
 Morris, Nichols, Arsht & Tunnell LLP  
 -and-  
 GUY W. CHAMBERS, ESQ.  
 Sideman & Bancroft LLP  
 (San Francisco, CA)  
 Counsel for Plaintiff

10:00:16 1 Also with me on behalf of Hershey Creamery is

10:00:30 2 Kevin Gold from Rhoads &amp; Sinon.

10:00:33 3 THE COURT: Good morning, all.

10:00:36 4 Let's talk about the first issue raised, the one

10:00:40 5 that is raised by plaintiff. Who is going to handle that?

10:00:43 6 Mr. Chambers?

10:00:43 7 MR. CHAMBERS: Yes, I am, Your Honor. Thank

10:00:43 8 you.

10:00:48 9 This has to do with the Hamilton Beach corporate

10:00:51 10 deposition we took. The issue is that while we received

10:01:00 11 during discovery a lot of drawings of various parts of the

10:01:03 12 infringing Hamilton Beach MIC 2000 blender, we were not

10:01:08 13 seeing typical documents we expected showing why critical

10:01:12 14 parts of the MIC 2000 were designed the way they were and

10:01:16 15 describing their functionality.

10:01:19 16 These missing functionality documents are the

10:01:23 17 most probative on the infringement issues.

10:01:27 18 So to find the missing functionality documents,

10:01:31 19 f'real sent to Hamilton Beach a corporate deposition notice

10:01:34 20 asking for testimony about the existence and location of

10:01:38 21 very specific documents relating to, among other things, the

10:01:42 22 mixing blade design, the cup sensor capabilities, the splash

10:01:48 23 shield design, and consideration of f'real's blenders in

10:01:52 24 designing the MIC 2000.

10:01:55 25 At the deposition, Hamilton Beach's attorney

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1 APPEARANCES CONTINUED:

2 BINDU A. PALAPURA, ESQ.  
 Potter Anderson & Corroon LLP  
 -and-

3 WILLIAM S. FOSTER, JR., ESQ., and  
 4 MARK S. ZHAI, ESQ.  
 Baker Botts L.L.P.  
 5 (Washington, D.C.)

6 Counsel for Defendant Hamilton  
 Beach Brands, Inc.

7 KEVIN M. GOLD, ESQ.  
 8 Rhoads & Sinon LLP  
 (Harrisburg, PA)  
 9 Counsel for Defendant  
 Hershey Creamery Company

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11 THE COURT: Counsel, good morning.  
 12 (Counsel respond "Good morning.")

13 THE COURT: Who on the line, please, for the  
 14 plaintiff?

15 MR. TOWNSEND: For the plaintiff, Your Honor,  
 16 this is Ethan Townsend and Rodger Smith from Morris Nichols  
 17 Arsht & Tunnell. With us is our co-counsel, Guy Chambers,  
 18 from Sideman & Bancroft in California.

19 THE COURT: Good morning.  
 20 For Hamilton Beach?

21 MS. PALAPURA: Good morning, Your Honor. This  
 22 is Bindu Palapura from Potter Anderson. With me on behalf  
 23 of Hamilton Beach is Bill Foster and Mark Zhai from Baker  
 24 Botts.

10:01:58 1 blocked us from obtaining this information by first

10:02:04 2 presenting a witness who had not worked with the MIC 2000,

10:02:07 3 and then not adequately preparing that witness to testify

10:02:11 4 about Hamilton Beach's corporate knowledge on the specific

10:02:15 5 topics. The witness would repeatedly say that he didn't

10:02:19 6 know about the existence of particular specific requested

10:02:23 7 documents, and pointed to one of three other people at

10:02:27 8 Hamilton Beach, Ben Branson, Brian Williams and Brian

10:02:31 9 O'Flynn, who actually worked on the MIC 2000 as being more

10:02:35 10 knowledgeable.

10:02:39 11 But when I asked the witness if he would contact

10:02:41 12 those people during the break to collect the requested

10:02:44 13 information, he was blocked by his attorney from doing so.

10:02:50 14 Then the witness was also instructed not to

10:02:54 15 answer questions about whether testing was done to determine

10:02:59 16 if the MIC 2000 mixing blade aerates.

10:03:04 17 At one point in the deposition, the witness

10:03:07 18 testified generally that these requested functionality

10:03:11 19 documents should be kept in certain directories and

10:03:15 20 subdirectories in the project folder on the M drive on the

10:03:19 21 Hamilton Beach server, but he didn't know what those

10:03:23 22 directories and subdirectories were. But he said he could

10:03:27 23 go down the hall and make a printout of them, which I asked

10:03:30 24 him to do during a break. Again, he was blocked by his

10:03:35 25 counsel from going down the hall during the break and making

10:08:59 **1** THE COURT: This is sort of classically, in my  
 10:09:03 **2** view, Mr. Chambers, raising form over substance.  
 10:09:07 **3** It seems to me clear from both sides, parties'  
 10:09:10 **4** statements, both lawyers' statements at this point, that you  
 10:09:13 **5** can get to where you need to be, and there is no resistance,  
 10:09:17 **6** at least, at bottom, to the notion that you are entitled to  
 10:09:21 **7** these functionality documents and the other things that you  
 10:09:24 **8** have mentioned. And you have just heard confirmation of  
 10:09:26 **9** that from Mr. Foster. I don't see why counsel, when you get  
 10:09:29 **10** off the phone with me, can't, without me micromanaging the  
 10:09:33 **11** discovery process, which I don't have time to do or the  
 10:09:36 **12** ability to do from afar, I am not going to practice law for  
 10:09:40 **13** you gentlemen -- why can't you work this out?  
 10:09:43 **14** MR. CHAMBERS: Your Honor, we are certainly,  
 10:09:49 **15** with your Court's guidance now, willing to go back and try  
 10:09:53 **16** again. For instance, that printout is of the directories  
 10:09:56 **17** and subdirectories --  
 10:09:58 **18** THE COURT: Counsel, let me ask you to do this.  
 10:10:00 **19** I am going to sit here like the proverbial potted plant, and  
 10:10:04 **20** you two talk to each other right now. I will take us off  
 10:10:08 **21** the record, so there is no need to fear that something is  
 10:10:11 **22** going to come back and bite you. Talk to one another right  
 10:10:15 **23** now. If you need my assistance, I will jump in. Then we  
 10:10:18 **24** will go to the next issue.  
 10:10:20 **25** (Discussion off the record.)

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10:14:57 **1** THE COURT: Appreciate that, counsel, very much.  
 10:15:00 **2** We are back on the record.  
 10:15:04 **3** Let me say for the record that counsel have, in  
 10:15:06 **4** the Court's view, worked cooperatively during the  
 10:15:09 **5** off-the-record conversation back and forth to come to  
 10:15:12 **6** essential agreement on the issues that were raised in  
 10:15:18 **7** plaintiff's first bullet and only bullet in the letter dated  
 10:15:23 **8** December 23.  
 10:15:25 **9** Hamilton Beach's issue.  
 10:15:30 **10** MR. FOSTER: Thank you, Your Honor.  
 10:15:31 **11** What we were raising was, with respect to one of  
 10:15:34 **12** the patents, the plaintiff has asserted 24 of the 27 claims.  
 10:15:40 **13** This is causing an undue burden on Hamilton Beach, partially  
 10:15:46 **14** because by doing so, it has raised, I believe, nine  
 10:15:52 **15** means-plus-function elements in the case. As you know, the  
 10:15:55 **16** Court issued an order that we are limited to 15 terms for  
 10:15:59 **17** purposes of Markman.  
 10:16:02 **18** Right now, the plaintiff is arguing all the  
 10:16:05 **19** control means with a single claim construction. We have  
 10:16:09 **20** responded to those. If you notice in our answering brief,  
 10:16:13 **21** we were able to also argue all the control means together.  
 10:16:17 **22** THE COURT: I haven't looked at your briefs,  
 10:16:18 **23** counsel. For the record, I have not looked at your briefs,  
 10:16:22 **24** obviously, at this point.  
 10:16:24 **25** MR. FOSTER: Okay, Your Honor.

10:16:26 **1** MR. CHAMBERS: I didn't hear that.  
 10:16:27 **2** THE COURT: I said I haven't looked at your  
 10:16:29 **3** briefs.  
 10:16:29 **4** MR. CHAMBERS: Thank you.  
 10:16:30 **5** THE COURT: The only reason, if memory serves,  
 10:16:33 **6** and it doesn't really too well all the time, I limited the  
 10:16:36 **7** number of claim terms is because, counsel, the number that  
 10:16:38 **8** you suggested the Court construe was in my view  
 10:16:43 **9** unreasonable. Therefore, you put me in a position of having  
 10:16:46 **10** to make an arbitrary decision. And I arbitrarily lopped it  
 10:16:51 **11** off from 30 or 29, whatever it was, about in half.  
 10:16:56 **12** You only get so much, you are entitled to only  
 10:17:01 **13** so much of this very limited resource. Okay, counsel?  
 10:17:05 **14** By the way, you are going to be limited in terms  
 10:17:09 **15** of hours at the Markman and in terms of hours at the trial.  
 10:17:15 **16** So one would think, I think reasonably should think, that  
 10:17:19 **17** you are going to pare your cases in accordance with the  
 10:17:24 **18** number of hours you are given or the amount of time you are  
 10:17:28 **19** given to prosecute and defend your claims.  
 10:17:31 **20** I will add this limitation, this caveat: that  
 10:17:35 **21** my limitations are not intended to artificially or  
 10:17:40 **22** arbitrarily cut a party off from asserting valid evidence,  
 10:17:48 **23** adducing evidence and making argument and the like that one  
 10:17:51 **24** needs to make out the elements of a claim or, on the other  
 10:17:56 **25** side, to successfully prosecute a defense.

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10:18:00 **1** With that said, I will let you continue.  
 10:18:05 **2** MR. CHAMBERS: Understood, Your Honor. We have  
 10:18:08 **3** worked to drop a number of terms. For example, after the  
 10:18:15 **4** Court's order, Hamilton Beach has voluntarily dropped a  
 10:18:18 **5** number of terms, at least four of the terms.  
 10:18:20 **6** The question becomes, Your Honor, whether or not  
 10:18:23 **7** the control means, if it's six different control means or  
 10:18:28 **8** they are all argued together. Right now, if they are all  
 10:18:32 **9** considered separate terms, there is likely 16 total terms.  
 10:18:37 **10** But if you look at the pleading, really, the control means  
 10:18:42 **11** kind of are slightly different variations of one another and  
 10:18:45 **12** are all recited in the dependent claims.  
 10:18:48 **13** There is also a number of means-plus-function  
 10:18:50 **14** claims in the independent claims of the '377 patent as well.  
 10:18:54 **15** So there is nine total terms.  
 10:18:57 **16** Again, means plus function, the statute requires  
 10:19:00 **17** that the structure be identified that performs the claimed  
 10:19:05 **18** function. While we think we have got it down to a number or  
 10:19:10 **19** size where, for example, the argument will be very limited,  
 10:19:14 **20** just talk about the plaintiff has just such a processor for  
 10:19:17 **21** performing the function, we are arguing it's part of an  
 10:19:20 **22** algorithm that is disclosed in the spec. We are hoping to  
 10:19:24 **23** get guidance.  
 10:19:25 **24** Like I said, we dropped a number of terms. The  
 10:19:28 **25** plaintiff is still asserting 24 out of 27 claims, including

10:19:32 **1** all these dependent claims with the means plus function. If  
 10:19:38 **2** the Court believes that all control means are separate  
 10:19:39 **3** elements, we are burdened, and we would like some reduction  
 10:19:42 **4** in the number of claims asserted in the patent.  
 10:19:44 **5** Like you said, Your Honor, they are not going to  
 10:19:46 **6** try 24 claims at the trial on this patent. Under the In Re  
 10:19:54 **7** Katz case, these claims are overlapping, many of them. One  
 10:19:57 **8** says, performing the processing according to a  
 10:20:00 **9** characteristic of the cup. Some say, performing the  
 10:20:02 **10** processing according to the size of the cup.  
 10:20:05 **11** Again, we think, if the Court does believe the  
 10:20:10 **12** case is still too big and we are not in compliance, we would  
 10:20:13 **13** ask for a reduction in the number of claims.  
 10:20:15 **14** THE COURT: You cite Katz for what proposition?  
 10:20:18 **15** You are going to have to refresh my recollection regarding  
 10:20:20 **16** Katz.  
 10:20:23 **17** MR. FOSTER: Your Honor, we cite Katz for the  
 10:20:25 **18** position that the plaintiff wouldn't be prejudiced by not  
 10:20:29 **19** asserting duplicative claims.  
 10:20:32 **20** THE COURT: Is that from my brethren at the  
 10:20:37 **21** Federal Circuit saying that?  
 10:20:40 **22** MR. FOSTER: Yes, Your Honor.  
 10:20:40 **23** THE COURT: I appreciate their guidance very  
 10:20:42 **24** much on how I manage my docket. I needed that.  
 10:20:58 **25** Plaintiff, what about it? Your opposition, your

10:21:03 **1** opponent is saying you are unduly burdening them with the  
 10:21:07 **2** number, the sheer number of claims that you are asserting  
 10:21:11 **3** and seemingly not needing to assert the number, 24.  
 10:21:16 **4** MR. CHAMBERS: Your Honor, on the other patents,  
 10:21:21 **5** for instance, the '662 patent, we have only asserted one  
 10:21:25 **6** claim. We have only asserted three claims for the '150  
 10:21:28 **7** patent.  
 10:21:29 **8** THE COURT: Without going chapter and verse  
 10:21:31 **9** through this, what can you do to assure me at this juncture  
 10:21:41 **10** that you are going to pare this down to a manageable number?  
 10:21:45 **11** 24 claims, we can't try that.  
 10:21:46 **12** MR. CHAMBERS: Your Honor, you make a good  
 10:21:48 **13** point. So what we have offered during the meet-and-confer  
 10:21:52 **14** is after this Court issues its claim construction rulings,  
 10:21:58 **15** we will huddle with our client --  
 10:22:02 **16** THE COURT: I think you need to begin the  
 10:22:03 **17** huddling process, counsel, you are well positioned to huddle  
 10:22:08 **18** without me advising you through, as it were, an advisory  
 10:22:13 **19** opinion on how to prosecute your case through a Markman  
 10:22:16 **20** order. You need to go ahead and fish or cut bait. And if  
 10:22:20 **21** you don't, in short order, I am going to do it for you.  
 10:22:24 **22** MR. CHAMBERS: Okay. We will do this after the  
 10:22:28 **23** Court issues its claim construction, so that may --  
 10:22:35 **24** THE COURT: Mr. Foster, what is your reaction to  
 10:22:37 **25** that?

10:22:39 **1** MR. FOSTER: Again, Your Honor, at this stage,  
 10:22:45 **2** most of the terms are going to be means-plus-function terms.  
 10:22:49 **3** I think all the control means terms can be argued together  
 10:22:52 **4** as a single claim term.  
 10:22:54 **5** THE COURT: And that is fine with me. And in  
 10:23:00 **6** that way, if what you are suggesting is, counsel, I should  
 10:23:07 **7** grant some relief from just the number 14, in reality, we  
 10:23:12 **8** would still be at that number, and that we could talk about  
 10:23:15 **9** however many -- I forget which claims you are talking about  
 10:23:19 **10** or which terms -- but they are essentially the same thing.  
 10:23:24 **11** If we can efficiently operate in that environment, I am  
 10:23:29 **12** willing to do that. Let me get a reaction from both of you  
 10:23:35 **13** to that.  
 10:23:38 **14** MR. CHAMBERS: Your Honor, I would essentially  
 10:23:42 **15** agree with my opposing counsel that the control means can be  
 10:23:47 **16** handled largely as a group. By my count, we were down to 17  
 10:23:53 **17** terms. Your arbitrary limit was 15. But six of those are  
 10:23:59 **18** the control means. The issue is actually fairly simple from  
 10:24:03 **19** our perspective. They have shoveled in, in the structure,  
 10:24:09 **20** everything imaginable --  
 10:24:12 **21** THE COURT: We are not going to do Markman right  
 10:24:13 **22** now.  
 10:24:16 **23** Mr. Foster, what is your reaction to what you  
 10:24:18 **24** have just heard?  
 10:24:19 **25** MR. FOSTER: Your Honor, we think that's the

10:24:21 **1** case. There is just an argument, not the algorithms. While  
 10:24:25 **2** the functions are slightly different, the specification is  
 10:24:28 **3** all common material. So it would be all closely related in  
 10:24:33 **4** an oral argument and could be disposed of fairly quickly.  
 10:24:38 **5** There are slight variations in the actual claim  
 10:24:39 **6** constructions because the functions, there are slight  
 10:24:42 **7** variations from one another.  
 10:24:44 **8** THE COURT: What I am hearing is I think both of  
 10:24:47 **9** you can live within the constraints of my order?  
 10:24:53 **10** MR. CHAMBERS: If we treat the six control means  
 10:24:56 **11** as a single claim limitation, then we are easily within your  
 10:25:01 **12** order. But that's up to the Court as to whether it wants to  
 10:25:04 **13** do that.  
 10:25:04 **14** THE COURT: Counsel, you know a lot more about  
 10:25:07 **15** your case than I do. If you feel that that is going to be  
 10:25:11 **16** adequate to your needs from the standpoint of my obligation  
 10:25:14 **17** as the purveyor of the meaning of disputed terms, I am  
 10:25:20 **18** comfortable with that, if both sides believe that you can do  
 10:25:25 **19** your jobs.  
 10:25:25 **20** (Pause.)  
 10:25:33 **21** THE COURT: It's mighty quiet out there.  
 10:25:37 **22** MR. FOSTER: Your Honor, I think we can. Again,  
 10:25:38 **23** there are slight variations. One is we are accused of not  
 10:25:46 **24** complying with the Court's order and meanwhile we are having  
 10:25:49 **25** to respond to these means-plus-function elements. We didn't